

### **REMARKS**

This responds to the Office Action mailed on October 4, 2004. No claims are amended, cancelled, or added. As a result, claims 1-44 and 46-50 remain pending in this patent application.

#### **§102 Rejection of the Claims**

Claims 1-5, 8, 30-32 and 40-42 were rejected under 35 U.S.C. § 102(e) for anticipation by Scheiner et al. (U.S. Publication No. 2002/0147475). Applicant traverses, for the reasons discussed below. However, Applicant reserves the right to swear behind Scheiner et al. as provided in 37 C.F.R. § 1.131, as well as all other applicable rights with respect to this § 102(e) reference.

Applicant cannot find in Scheiner et al. any disclosure of sensing a condition correlative to edema, as recited or incorporated in claims 1-5, 8, 30-32 and 40-42. Scheiner et al. pertains to detecting hypotension. (*See* Scheiner et al. at Abstract.) Such hypotension involves a fluid shift *away* from the thorax and toward the extremities. (*See id.* at ¶ 5.) By contrast, the present claims pertain to sensing a condition correlative to edema, which involves fluid *accumulation* in the lungs. (*See* Application at page 1, lines 22-23.) The edema of the present application is fairly opposite to the hypotension of Scheiner et al. The hypotension of Scheiner et al., therefore, is not correlative to edema. In fact, the hypotension of Scheiner et al. expressly teaches directly away from edema. Because all elements of claims 1-5, 8, 30-32 and 40-42 are not present in Scheiner et al., Applicant respectfully requests withdrawal of this basis of rejection of these claims.

#### **§103 Rejection of the Claims**

Claims 6, 7 and 43 were rejected under 35 USC § 103(a) as being unpatentable over Scheiner et al. (U.S. Publication No. 2002/0147475) in view of Combs et al. (U.S. Patent No. 5,957,861). Applicant respectfully traverses.

Applicant's traversal is made on the grounds that the Scheiner et al. reference is disqualified by the American Inventors Protection Act (AIPA) of 1999 from being used as a reference against the present patent application under 35 U.S.C. § 102(e)/103. Applicant

declares that, to the best of Applicant's knowledge, at the time the present invention was made, the present patent application and the application for the Scheiner et al. U.S. Publication No. 2002/0147475 were owned by the same entity, that is, Cardiac Pacemakers, Inc. The application for Scheiner et al. U.S. Publication No. 2002/0147475 was filed on April 10, 2001, and did not publish until October 10, 2002. Applicant believes, therefore, that the Scheiner et al. U.S. Publication No. 2002/0147475 is disqualified as a reference for purposes of section 102(e)/103(a) under 35 U.S.C. 103(c). Accordingly, Applicant respectfully requests withdrawal of this basis of rejection of claims 6, 7 and 43 the present patent application insofar as it relies upon the Scheiner et al. reference.

*Allowable Subject Matter*

Applicant gratefully acknowledges the allowance of claims 15-29, 33-39, 44 and 46-50.

Claims 9-14 were objected to as being dependent upon a rejected base claim, but were indicated to be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. However, for the reasons discussed above, Applicant believes that claims 9-14 are allowable in their present form. Accordingly, Applicant respectfully requests early allowance of these claims 9-14.

Conclusion

Applicant respectfully submits that the claims are in condition for allowance, and notification to that effect is earnestly requested. The Examiner is invited to telephone Applicant's attorney at (612) 373-6951 to facilitate prosecution of this application.

If necessary, please charge any additional fees or credit overpayment to Deposit Account No. 19-0743.

Respectfully submitted,

QINGSHENG ZHU ET AL.

By their Representatives,

SCHWEGMAN, LUNDBERG, WOESSNER & KLUTH, P.A.

P.O. Box 2938

Minneapolis, MN 55402

(612) 373-6951

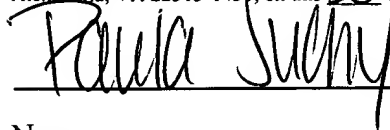
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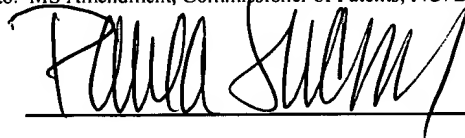
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CERTIFICATE UNDER 37 CFR 1.8: The undersigned hereby certifies that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail, in an envelope addressed to: MS Amendment, Commissioner of Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on this 30 day of December, 2004.



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